Supreme Court, U.S.
FILED
04-681 NOV 15 2004
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No.

IN THE

Supreme Court of the United States

CORA F. LINDQUIST, INDIVIDUALLY AND AS EXECUTRIX FOR THE ESTATE OF JAMES O. LINDQUIST,

Petitioner,

v.

BUCKINGHAM TOWNSHIP AND THE BOARD OF SUPERVISORS OF BUCKINGHAM TOWNSHIP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether, in municipal liability cases arising from land use decisions made after lengthy deliberation, the "shocks the conscience" standard, as applied by this Court in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) to police officers in emergency pursuit cases, is the proper standard to apply to establish a municipal violation of substantive due process under the Fourteenth Amendment.

II. Whether a district court abuses its discretion in denying leave to amend a complaint on the basis of undue delay where there has been no finding of prejudice to the opposing party or the court or of bad faith on the part of the moving party.

PARTIES TO THE PROCEEDING

The Petitioner is, Cora F. Lindquist, individually and as Executrix of the Estate of James O. Lindquist.

The Respondents are Buckingham Township and the Board of Supervisors of Buckingham Township.

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OPINIONS BELOW

The opinion of the Third Circuit is not reported and is reprinted in Appendix D to the Petition. The Order of the Third Circuit denying rehearing is not reported and is reprinted in Appendix A to the Petition. The opinions of the District Court are not reported and are reprinted in Appendix H and I to the Petition.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). Petitioner seeks review of a decision by the Third Circuit affirming the dismissal by the District Court of claims made by petitioner arising under the United States Constitution and federal law. The Court of Appeals denied petitioner's appeal on July 19, 2004. Petitioner's request for a rehearing by the Third Circuit was denied by Order dated August 17, 2004. This petition has therefore been timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES IN ISSUE

This case concerns petitioner's attempts to vindicate its rights to due process and equal protection under the United States Constitution. The Constitutional provision involved is the Fourteenth Amendment. The relevant portions of the Fourteenth Amendment (Sections 1 and 5) provide:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States

> and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The statutory provision involved in the case, 42 U.S.C. § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The federal rule of civil procedure involved in this case is Federal Rules of Civil Procedure 15(a), which provides:

> **Amendments.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

STATEMENT OF THE CASE

A. Factual Background

This case is the result of James O. and Cora F. Lindquists' (the **"Lindquists"**) six year struggle to obtain development approval for their farm.

The Lindquists' farm is located in Buckingham Township (the **"Township"**) in the Commonwealth of Pennsylvania and consists of two adjoining parcels (the **"Property"**). The front parcel comprises 102 acres and is jointly owned by the Lindquists. The back parcel comprises 147 acres and is owned by James O. Lindquist and the Lindquists' three children.

The Property is located within the Township's AG-1 zoning district, which at the time of the Lindquists' original subdivision application, permitted the development of a cluster subdivision utilizing transferable development rights (**"TDR"**) as a by-right use. Commencing in 1994, the Lindquists sought to develop the Property as a cluster subdivision consisting of approximately 216 single family lots using TDRs.1

The Township offers a pre-submission sketch plan procedure for developers. The procedure allows a developer to submit a pre-submission sketch plan before filing a land development application with fully engineered plans so that he can receive direction from the Township's Board of Supervisors (the **"Board"**) whether the Township has any interest in the plan and whether the Township will require strict compliance with all ordinance requirements or will grant waivers from ordinance requirements.

The Lindquists took advantage of the pre-submission sketch plan procedure offered by the Township. Starting in February 1994, the Lindquists met with the Township informally to discuss development of the Property. During the meetings, the Township informed the Lindquists of its goals for any development plan for the Property: (i) to leave undisturbed approximately 60 acres of the front parcel to preserve an aesthetically pleasing vista; (ii) to confine the cluster

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1 In their late 60s and experiencing health problems, the Lindquists could no longer make a living farming the Property.

development to the center and back portions of the Property so that it would be screened from York Road, and; (iii) to utilize TDR's to preserve farmland.

In response to the Township's directive, the Lindquists prepared and submitted to the Township for review an initial sketch plan and after receiving comments a revised sketch plan incorporating the Township's goals for the Property. The sketch plans incorporated the Township's directives by: (i) preserving the vista; (ii) preserving approximately 100 acres from development; (iii) providing continued use of the front parcel as a farm; (iv) compressing the development to the center and back of the Property, and

(v) providing for the use of TDR's so that other farmland would be preserved.

The sketch plans were favorably received by the Board and the Planning Commission. The consensus of the Planning Commission was that the Proposed Development was "well thought out and should work well in the Township." Henry Rowan (**"Rowan'**), who was to shortly become a member of the Board stated that he was "pleased with the sketch as presented and it appears to be one of the more creative and innovative plans presented in a long time."

Compressing the proposed development to the center and back portions required certain waivers from the Township's Subdivision and Land Development Ordinances (**"SALDO"**). The Township's staff, the Planning Commission and the Board understood that waivers from SALDO would be required in order to develop the Property in conformity with the sketch plans.

Based on the sketch plans and ongoing discussions with Township officials, the Lindquist prepared a set of

preliminary plans providing for development of the property in two phases. Phase I was to consist of 111 single family lots located on the back of the front parcel and Phase II was to consist of 110 single family lots located on the back parcel. On March 29, 1996, the Lindquists submitted an application for preliminary subdivision approval for Phase I (**"Original Phase I Plan"**). The layout depicted on the Original Phase I Plan was consistent with the previously submitted sketch plans.

The Original Phase I Plan was reviewed by Lynn Froehlich-Bush (**"Froehlich"**), the Township' Planning Consultant, for compliance with the Township's Zoning Ordinance, and Ernest Knight (**"Knight"**), the Township's Consultant Engineer, for compliance with SALDO. The reviews did not identify any zoning deficiencies. Froehlich, however, commented that "[m]any aspects of the site layout are advantageous to the Township."

On May 1, 1996, the Planning Commission reviewed the Original Phase I Application wherein the participants discussed, *inter alia*, each of Knight's comments, particularly items which would require waivers from SALDO. There was no opposition by Ernest Knight or the Planning Commission to the waivers. Moreover, a number of the waivers that the Lindquists were requesting were common and routinely granted by the Board.

In mid-May 1996, a dramatic shift occurred in the Township's attitude towards the Lindquists and their development plan for the Property. Knight became "personally offended" when the Lindquists' attorney challenged in a letter his professional assessment of stormwater run-off criteria as they related to portions of the Property that were not being

developed. Thereafter, exhibiting personal animosity to the Lindquists and their attorney, the Township engaged in a four year campaign to delay and undermine the Lindquists' development plans.

During an August 28, 1996 meeting purportedly scheduled to approve the Lindquists' waiver requests,

Rowan condemned the Lindquists, their land planner, engineers and attorney for having submitted a subdivision plan to the Township which did not comply with each and every SALDO provision. Rowan's conduct was arbitrary and capricious in that it ignored that: (i) he had previously commented that the plan appeared "to be one of the more creative and innovative plans presented in a long time"; (ii) the layout depicted on the Original Phase I Plan was consistent with the layouts depicted on the sketch plans which were reviewed and consented to by the Board and Planning Commission; (iii) virtually all of the requested waivers were needed to "compress" the development and preserve the front portion of the Property from development as demanded by the Township; and (iv) the Planning Commission and Township Staff had recommended the requested waivers. Instead of approving the requested waivers, the Board directed the Lindquists to meet with Township Staff to work out the waiver issues.

Pursuant to the Board's direction, the Lindquists met on several occasion with Township staff in September 1996 and reached a compromise. Inexplicably, the Board rejected the recommendations of its professional staff.

Stymied by the Board's abrupt change in attitude, the Lindquists confronted the Board at an October 23, 1996 meeting. The Lindquists presented to the Board a "By-

Right" alternate plan for the development (**"By-Right Plan"**) which demonstrated that the Lindquists could develop the Property in full compliance with SALDO by extending the development into the front parcel. Because the zoning regulations permitted the subdivision of the property into cluster subdivision as a "by-right" use, the Board would have had to approve the By-Right Plan if submitted. The Board did not want the By-Right Plan and directed the Lindquists to proceed with Original Phase I Plan. The Board agreed to grant the waivers required and to process the plan under the August 24, 1994 zoning ordinance, as amended December 13, 1995. The Board, nonetheless, imposed a further condition, however, that the Lindquists to participate in a regional wastewater system yet to be designed (the **"Regional Sewage System"**) even though the Original Phase I Plan was designed around the stand-alone system that the Township had until then required.

The Lindquists could not proceed with their development plans until the design of Regional Sewage System was completed and at which time the Lindquists could prepare and file a revised plan accommodating the new system. Thus, the Lindquists had no option but to offer the Board a series of extensions of time postponing any action by the Board on the Original Phase I Application until such time as the design of the Regional Sewage System was completed and a revised plan could be submitted.

In the meantime, in February 1997, the Board amended SALDO to eliminate cul-de-sac streets. If the amendment were to be applied to the Lindquists' development plan, the plan as proposed would be prohibited.

By June 1997, the design of the regional sewage disposal system was sufficiently completed so that the Lindquists were able to prepare revised development plans. By letter dated June 10, 1997, the Lindquists' attorney advised the Board: (i) that the design of the regional sewage disposal system had now been sufficiently determined to allow the Lindquists to prepare a revised plan; (ii) that the Lindquists intended to submit a Revised Phase I Plan by the end of June 1997, and; (iii) that the Lindquists agreed to an extension of the statutory review period on the Original Phase I Plan to August 30, 1997.

On June 11, 1997, the Lindquists also filed an application for preliminary subdivision approval for Phase II (**"Phase II Plan"**). Also, on June 11, 1997, the Board enacted an additional amendment to the zoning ordinance which eliminated cluster subdivisions as a "by-right" use in AG-1 zoning districts and provided for cluster subdivisions only as a conditional use.

The Township again embarked on a course of conduct intended to thwart development of the Lindquists' Property. The Board scheduled the Phase II Plan to be reviewed by the Planning Commission within two weeks of its submission and before any professional reviews were provided in clear violation of SALDO provisions

Having received notice of the Lindquists' imminent filing of a revised plan, the Township placed the Original Phase I Plan on the Board's agenda for June 24, 1997. The Lindquists responded requesting postponement of the plans consideration. because: (i) their attorney was not available on such short notice to attend the meeting; (ii) the Revised Phase I Plans would be submitted within the next two weeks;

(iii) delay in submitting the revised plans was the result of Lindquists having to wait for the Township to complete its design the Regional Sewage System; (iv) the Lindquists agreed to extend the statutory review period for the Phase I and Phase II applications. Notwithstanding, after inducing the Lindquists to forgo their By-Right Plan, on June 25, 1997, the Board enacted Resolution 1533, denying the Lindquists Original Phase I Subdivision Application and the Original Phase II Subdivision Application.

The Board's refusal to grant the Lindquists an extension of the review period was in bad faith, given the Board's own admission that, under the Pennsylvania Municipalities Code (**"MPC"**), "a developer has the right to extend the review period and normally if a developer asks for an extension, they're granted an extension." By enacting Resolution 1533, the Board intentionally divested the Lindquists of their right to develop a single family detached cluster subdivision as a "by-right" use and to develop the Property in accordance with Zoning Ordinances and SALDO in effect prior to the Board's enactment of amendments.

After the Board denied the subdivision applications, on September 3, 1997, the Lindquists commenced legal proceedings against the Township in the Buck's County Court of Common Pleas. The legal proceedings commenced by the Lindquists were resolved on November 12, 1997 by a Stipulation of Settlement signed by the parties and entered as an Order of Court on December 12, 1997 (collectively referred to as the **"December 12, 1997 Order"**).2 The December 12,

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2 During the negotiation of the Stipulation of Settlement, the Lindquists provided the Township with a copy of the Revised Phase I Plan that had been prepared and which the Lindquists

1997 Order provided the Lindquists, *inter alia*, with (i) the right to submit Revised Phase I Plans to the Board which would be governed by the ordinances in effect on December 13, 1995; (ii) the right to submit further revised plans (**"Further Revised Plans"**) to address comments raised by the Board's consultants' in their reviews of the revised plans for Phase I and Phase II, and; (iii) that any Further Revised Plans filed for Phase I would also be governed by the ordinances in effect on December 13, 1995.

On or about November 18, 1997, the Lindquists formally filed with the Township the Revised Phase I Application, which included a revised subdivision plan for Phase I of the Property (the **"Revised Phase I Plan"** or the **"Revised Plan"**).

The Township realized that so long as the Lindquists were cooperating with the Planning Commission and Township consultants to revise and improve the original plans, the Court Order required the Board to consider the plans under the 1995 ordinances and this would eventually lead to an approval. Therefore, the Board adopted a strategy to work around the December 12, 1997 Court Order almost immediately after the Order was signed. In January of 1998, the Township's consultants issued review letters for the Revised Phase I Plan. Although the normal practice in the Township after a plan has been reviewed by consultants is for subsequent "revised" submissions to be reviewed incrementally, *i.e.* to check the revised plans against the earlier comments to see if the comments were addressed in the revised plan, the

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intended to file so that the Township had the opportunity to see the plan before executing the Stipulation of Settlement.

Township's consultants, at the direction of the Board and contrary to the December 12, 1997 Order, processed the Revised Phase I Plan as a "new" plan. The Planning Commission also treated the Revised Phase I Plan as a "new" plan.

By treating the Revised Phase I Plan as a "new" plan, the Township improperly and in violation of the December 12, 1997 Order, sought to avoid all prior agreements and understandings.

After receiving the Township's consultants' review letters, the Lindquists felt that they had been sandbagged. Many of the additional comments in the Township's consultants' review letters were minor and non-substantive making it apparent that the purpose was to throw "everything at us and seeing what stuck to the wall."

Although many of the comments contained in the review letters were able to be resolved, certain issues could not be resolved without input from the Board. By letter dated April 16, 1998, the Lindquists informed the Board of their need for direction from the Board on a number of issues before they could proceed with the revisions to the plan. Finally, at a May 13, 1998 meeting, the Board gave the Lindquists cursory direction on three unresolved issues. However, those instructions directly contradicted prior agreements reached with the Township at the October 23, 1996 meeting. At the May 13, 1998 Board meeting, the Board agreed to an extension of the review period for the Revised Phase I Plan until July 30, 1998 purportedly so the Lindquists could submit Further Revised Plans.

On July 20, 1998, the Lindquists informed the Township that the Further Revised Plans would be submitted by the end of July. The Lindquists also offered an additional

extension of time to the Board to allow the Board time to review the revised plans.

Although the Board accepted each of the Lindquists' previous offers extending the review period, in a repeat of its earlier actions, the Board, without notifying the Lindquists, rejected the proffered extension. The Board's refusal to accept the extension was contrary to the MPC (which permits developers to extend the review period) and its own standard practice (which is to grant extensions if asked by a developer).

On July 22, 1998, the Board adopted Resolution No. 1598 denying the Lindquists' Revised Phase I Plan even though it knew that a Further Revised Plan was going to be filed by the end of the month. The Township admitted that it rejected the Revised Phase I Plan because it "knew that the Lindquists were getting closer to compliance with Township ordinances and wanted to reject the Revised Phase I Subdivision Plan before the Lindquists submitted any further revised plans." However, in their haste to deny the Revised Phase I Subdivision Plan before the Lindquists could submit Further Revised Plans, the Board denied the wrong plan, *i.e.* the Original Phase I Plan.

Despite the Board's action, the Lindquists filed the Further Revised Plan on July 31, 1998 Township officials took the Further Revised Phase I Subdivision Plan into their possession but stated that they would not formally accept them and would treat them as "new" plans.

Realizing that Resolution 1598 denied the wrong plan, on August 12, 1998, the Township quickly adopted Resolution 1599, which "re-adopted and confirmed" Resolution 1598 and retroactively sought to supplement Resolution

1598 to include the rejection of the Revised Phase I Plan. Resolution 1600 rejected all plans filed through July 22, 1998, accepted the Further Revised Phase I Plan filed on July 31, 1998 and set August 31, 1998 as the deadline for its review. Resolution 1599 did not list any reasons for denial of the Revised Phase I Plan but rather incorporated the reasons listed in Resolution 1598. The Board did not deny the Revised Phase I Plan on the merits since the Board members admitted that they enacted Resolution 1598 without bothering to read it, and without making any effort to determine whether the deficiencies listed in Resolution 1598, as incorporated by Resolution 1599, applied to the Revised Phase I Plan. The deficiencies identified in Resolution 1598, however, did not apply to the Revised Phase I Subdivision Plan because those deficiencies which were copied from Resolution 1533 and had been addressed in the Revised Phase I Plan.

The Board admitted that at the time that it enacted Resolution 1599 it already intended to deny the further revised plans filed on July 31, 1998. As of August 12, 1998, the Lindquists had not received any review letters for the Further Revised Plan nor had they received any notice that the Further Revised Plan had been placed on the meeting Agenda for the Planning Commission.

In a memorandum dated August 21, 1998, the Township Solicitor advised the Board that: (i) the Township's SALDO requires review of plans by the Planning Commission; (ii) the Board's rejection without a review by the Planning Commission would violate the Township's own ordinances; (iii) the December 12, 1997 Court Order permitted the filing of revised plans; (iv) the Further Revised Plans

filed on July 31, 1998 should be considered "revised" plans; (v) the December 12, 1997 Court Order did not set a limit on the number of revised plans that could be submitted; (vi) the Township should conduct appropriate reviews of the Further Revised Plan and provide information to the Lindquists; and (vii) the Further Revised Plans should be governed by ordinances as they existed on December 13, 1995. Disregarding its own solicitor's advice, the Board, did not have the Planning Commission review the Further Revised Plans and instead placed the Further Revised Plans on the Board's August 26, 1998 agenda, and requested expedited reviews from its consultants. The Township's consultants did not complete their reviews of the Further Revised Plan until the evening of August 28, 1998. On August 26, 1998, the Board enacted Resolution 1600 and denied the Further Revised Plans. For the first time in Township history, the Board denied plans on the same day that it received its consultants' review letters. In any event, as further underscoring of the Board's bad faith and arbitrary approach, the first 57 reasons stated for denial in Resolution 1600 were the same reasons listed in Resolution 1533, which the Lindquists had already addressed in the intervening 14 months.

The following day, the Board informed the Lindquists that the Further Revised Phase I Plan would be treated as a "new" submission requiring payment of new fees and subject to review under the Zoning Ordinance and SALDO as existed on that date. As a new submission, the plans would not comply because SALDO no longer permitted cul-de-sacs and zoning regulations now required conditional approval of cluster subdivisions. The Board admitted that it enacted the Resolution 1600 to ensure that all

contingencies were covered, *i.e.* that the Further Revised Plans were denied as a revised plan and as a "new" plan.

B. State Court Decision

The Lindquists commenced two lawsuits against the Township in the Court of Common Pleas of Bucks County (**"State Court"**): (i) a mandamus action against the Board seeking a "deemed approval" under 53 Pa.C.S.A. §10508 (the **"State Court Action"**); and (ii) a land use appeal of Resolutions 1598, 1599 and 1600. In the State Court Action, the Township sought to present evidence that, *inter alia*: (i) none of the Lindquists' development plans complied with the Township's Zoning Ordinance or SALDO; (ii) the Revised Phase I Plans contained "serious zoning violations"; (iii) the Revised Phase I Plans contained a "great number of subdivision violations"; and (iv) the reasons set forth in the First Denial Resolution still applied to the Revised Phase I Plan.

After all the evidence was presented, the State Court rendered a decision (**"State Court Decision"**) which contained 203 specific findings of fact and ordered that the

Revised Phase I Plan was "deemed approved" for the Township's failure to comply with 53 Pa.C.S.A. §10508. In the State Court Decision, the State Court made over 89 separate findings of fact dismissing each of the Township's claims of purported SALDO violations, strongly criticized the Township's improper review of the Lindquists' development plans, and ordered the Board to act in good faith in proceeding with the review and adjudication of all matters relating to the proposed development.

The Board filed an appeal with the Commonwealth Court of Pennsylvania (**"Appeal"**) which was withdrawn

after the parties reached a settlement as to the State Court Action only.

C. The Federal Action

The Lindquists commenced this federal civil rights action on March 10, 2000, 3 after the Township continued to impede development of their land, notwithstanding the State Court Decision.

On May 24, 2000, the Lindquists filed an Amended Complaint against, *inter alia*, the Township and Board (collectively referred to as the **"Township"**) 4 alleging that the Township's conduct in reviewing, processing and adjudicating their land development applications violated their substantive due process rights as protected by 42 U.S. § 1983 and the Fourteenth Amendment of the United States Constitution. On December 13, 2000, the Township filed an Amended Answer, Affirmative Defenses and Crossclaim after the District Court dismissed the Township's Rule 12(b) motions. Thereafter, the parties proceeded with discovery pursuant to scheduling orders entered by the District Court.

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3 James O. Lindquist died on January 7, 2002. Cora O. Lindquist, in her capacity as Executrix for his Estate was substituted as Plaintiff.

4 The Lindquists' Amended Complaint also asserted claims against Bush, , Knight, Froehlich, and each of the members of the Board of Supervisors, individually and in their official capacity. Thereafter, by agreement of the parties, the individual Board members and Froehlich were dismissed as parties. In or about September, 2002, shortly before trial, Plaintiffs settled its claims against Knight and Bush.

On June 14, 2001, at the request of counsel for Knight, the District Court stayed all proceedings in the case and placed the case in civil suspense. While the stay was in effect, the Township produced documents to co-defendants but did not produce them to the Lindquists.5 On August 7, 2001, the Court issued an Order transferring the action out of civil suspense and on the same date entered a scheduling order establishing a schedule for the filing of summary judgment motions and trial. The order did not allow any additional time for discovery or discovery motions.

On September 26, 2001, the parties filed cross motions for summary judgment, and in October, 2001, the parties filed their respective answers to the summary judgment motions. The Lindquists in their motion requested that the District Court, *inter alia*, grant preclusive effect to each of the 203 findings of fact made by the State Court. By Order dated November 20, 2001, the District Court granted preclusive effect only to the following two findings:

> a. The Board of Supervisors failed to take timely action on the Lindquists' Revised Phase I Subdivision Plan submitted November 18, 1997 because it denied the wrong plan in Resolution No. 1598 on July 22, 1998.

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5 The Lindquists served written discovery requests seeking, *inter alia*, minutes of all of the meetings of the Board during the relevant time period. While the Township produced all the meeting minutes to co-defendants during the stay of proceedings, it never informed the Lindquists of the document production and only provided copies of selective meeting minutes to the Lindquists' in response to their discovery requests.

b. The Lindquists' Revised Phase I Subdivision Plan was "deemed approved" upon the failure of the Township to comply with § 508 of the Municipalities Planning Code, Pa. Stat. Ann. Titl 53, § 10508, on or before July 31, 1998.

The District Court then denied the Lindquists' and each defendants' motion for summary judgment because of the existence of genuine issues of material fact.

On December 13, 2001, Bush appealed the District Court's Order. As a result, by Order dated December 14, 2001, the District Court removed the case from the trial list pending resolution of Bush's appeal.

After the case was reactivated in August, the Lindquists sought to obtain the complete minutes from Township's counsel with no success. Since the records were public documents, the Lindquists visited the Township building and requested to see the meeting minutes. The Township refused to make the requested records available for review upon learning that the request was being made on behalf of the Lindquists. The Lindquists also made a formal request to the Township Solicitor for the documents pursuant to the Pennsylvania Right to Know Act. The Township Solicitor, while acknowledging the Lindquists' right to review the documents, delayed in making the documents available. In December 2001, the Lindquists sent a different person to the Township building without disclosing his relationship to the Lindquists. He was given access to full and complete copies of Board meeting minutes and other records. Based upon that review, the Lindquists learned that another similarly situated development, located just around the corner from the

Lindquists' Property, was treated differently by the Township.

As a result of the newly discovered evidence, on December 21, 2001, the Lindquists filed a motion seeking leave to amend their Amended Complaint to add an equal protection claim against the Township only. The equal protection claim was based on the Township's different treatment of the Lindquists from other similarly situated developers.

The District Court took no action on the Motion to amend for six months. On May 31, 2002, after Bush's appeal was dismissed by the Third Circuit, the District Court issued an Order transferring the case out of civil suspense and listed the case for trial in September. Thereafter, on June 13, 2002, the District Court issued an Order denying the motion to amend on the sole ground of "undue delay."

Convening on September 17, 2002 and concluding on September 24, 2002, the case was tried before the District Court without a jury.6 During trial, the Lindquists reproved each of the findings of fact made by the State Court and presented further evidence of the Townships arbitrary and capricious misconduct. Thereafter, pursuant to the request of the District Court, the Lindquists and the Township

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6 During the course of the trial, the Lindquists sought to introduce evidence of the Township's different treatment of another similarly situated development as evidence of the Township's improper motive and arbitrariness in its denial of the Lindquists' development plans. The District Court excluded such evidence on the grounds, *inter alia*, that there was no equal protection claim, and introduction of such evidence would extend the length of the trial.

submitted Proposed Findings of Fact, Proposed Conclusions of Law and supporting Memoranda of Law.

However, after the trial, on January 14, 2003, the Third Circuit issued its decision in *United Artists Theatre Circuit, Inc. v.* Township *of Warrington, PA*, 316 F.3d 392 (3d Cir. 2003) wherein it extended the "shocks the conscience" standard articulated by this Court in *County of Sacramento v. Lewis* to substantive due process cases arising from municipal land use decisions. In so holding, the Third Circuit departed from its prior decisions which required a plaintiff to prove that municipal conduct was motivated by bias, bad faith or improper motive in order to establish a substantive due process violation under the Fourteenth Amendment.

On April 15, 2003, the District Court issued its Findings of Fact and Conclusions of Law ("District Court Opinion"). At page 16, the District Court stated:

> After the trial, our Court of Appeals issued a decision that heightened the bar for plaintiffs challenging municipal land use decisions on substantive due process grounds. *See United Artist Theatre Circuit, Inc. v. Township of Warrington, PA*, 316 F.3d 392, 401 (3d Cir. 2003), *reh'g en banc denied*, ---F.3d---, No. 01-3533, 2003 U.S. App. LEXIS 5936 (3d Cir. Feb. 25, 2003). In order to prevail on a substantive due process claim, plaintiffs must now demonstrate that a defendant's conduct in depriving them of a protected property interest was of such nature as to "shock the conscience." *County of Sacramento v. Lewis*,

> 523 U.S. 833, 846-48 (1998); *United Artists*, 316 F.3d at 401. This approach is a departure from prior precedent, which simply required plaintiffs to prove that a defendant acted with an improper motive. *See Woodwind Estates, LTD v. Gretkowski*, 205 F.3d 118, 124 (3d Cir. 2000); *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir. 1987). App. 54-55.

Applying this new heightened standard to this case, the District Court concluded:

> "In addition, the defendants may have been negligent at times and in 1998 may have acted with an improper motive toward the Lindquists and their representatives. However, there is nothing in the facts we have found to prove that the defendants' conduct was so egregious as to be "conscience shocking." In evaluating the circumstances and reaching this conclusion, we are mindful of the Third Circuit's direction that we are to avoid sitting as a "zoning board of appeals." *United Artists*, 316 F.3d at 402 (citations omitted). Accordingly, we will enter judgment in favor of the defendants and against the plaintiffs on the plaintiffs' substantive due process claim. App. 37.

The Lindquists filed a timely appeal to the Third Circuit and sought *en banc* review. The Lindquists' request for *en banc* review was denied.

On appeal, the Third Circuit, in a two to one decision, affirmed the District Court. In its Opinion and Order dated July 19, 2004, the Third Circuit cited *United Artists* with approval and held that the "shocks the conscience" was the proper standard to apply to substantive due process claims against municipalities arising from land use decisions. The Third Circuit reasoned that, "without more, a violation of state law, even a bad faith violation of state law, will not support a substantive due process claim in a land-use dispute. The Third Circuit concluded that the conduct of the Township in this case did not rise to the level of "conscience shocking" behavior.

The Third Circuit further affirmed the District Court's denial of the Lindquists' motion for leave to amend their Amended Complaint on the basis of delay without requiring finding of prejudice on the part of the Township or burden on the District Court or bad faith on the Lindquists.

The Lindquists' sought *en banc* and/or panel rehearing, which request was denied by Order dated August 17, 2004.

REASONS FOR GRANTING WRIT

I. THE PETITION SHOULD BE GRANTED TO RESOLVE THE SPLIT OF AUTHORITY IN THE CIRCUIT COURTS AS TO THE STANDARD NECESSARY TO ESTABLISH A VIOLATION OF SUBSTANTIVE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT IN CASES INVOLVING MUNICIPAL LAND USE DECISIONS

The petition should be granted in this case because a significant split of authority exists among the circuits with respect to the standard to be applied in evaluating substantive due process claims against municipalities arising from land use decisions.

The First, Second, Sixth, and Eight Circuits confronted with substantive due process challenges to land use decisions are aligned with the Third Circuit in applying the "shocks the conscience" standard. *See Banks v. City of Whitehall*, 344 F.3d 550 (6th Cir. 2003); *Entergy, Arkansas, Inc. v. Nebraska*, 241 F.3d 979 (8th Cir. 2001); *Williams v. Denver, City and County of,* 99 F.3d 1009 (10th Cir. 1996); *Lawrence v. Achtyl,* 20 F.3d 529 (2d Cir. 1994); *Amsden v. Moran,* 904 F.2d 748 (1st Cir. 1990)

The Fourth, Seventh, Ninth and Eleventh Circuits appear to take the position that property interests are not protected by the substantive component of the due process clause of the Fourteenth Amendment. *See Squaw Valley Dev. Co. v. Goldenberg*, 2004 WL 1615077 (9th Cir.)(an alleged governmental interference with property rights is governed solely by the Fifth Amendment's Taking Clause and no basis for a substantive due process claim in a land use matter); *Greenbriar Village L.L.C. v. Mountain Brook City*, 345 F.3d 1258 (11th Cir. 2003)(property interests are not created by the Constitution and are not protected by substantive component of Due

Process Clause); *Esplanade Properties LLC v. City of Seattle*, 307 F. 3d 978 (9th Cir. 2002).

> The Fourth, Fifth and Seventh Circuits apply the rational basis test to determine whether there has been a violation of substantive due process by a municipal government in rendering a land use decision. *See Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 440 (4th Cir. 2002)(holding that the challenged zoning determination clearly did not fall beyond outer limits of legitimate governmental action ... the County's actions were rationally related to a legitimate governmental purpose.); *Durigan Sanitary Dist. No. 4 – Town of Brookfield*, 5 Fed. Appx. 492, 494-95 (7th Cir. 2001)(land use regulations satisfy substantive due process if they do not violate a specific constitutional guarantee and are rationally related to a legitimate governmental interest.) *See also Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461 (7th cir. 1988).
>
> The District of Columbia Circuit applies a very deferential standard of review of substantive due process claims holding that "[o]nly a substantial infringement of state law prompted by personal or group animus, or a deliberate flouting of the law that trammels significant personal or property rights, qualifies for relief under § 1983." *Silverman v. Barry*, 845 F.2d 1072, 1080 (D.C. Cir.), cert. denied, 488 U.S. 956 (1988). Accord *George Wash. Univ. v. District of Columbia*, 318 F.3d 203, 209 (D.C. Cir. 2003)

As demonstrated by the foregoing, the circuits are deeply divided on the standard to be employed by federal courts in reviewing land use decisions. *See e.g. Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1214 (6th Cir. 1992) (circuits deeply divided concerning the theories to be employed in federal court cases challenging zoning); *RRI Realty Corp. v. Incorporated Village of South Hampton*, 870 F.2d 911, 914 (2d Cir. 1989)(Federal courts have followed a somewhat uneven course in explaining the rationale for and the extent to which the substantive component of the Due Process Clause protects landowners in dispute with local agencies empowered to limit permissible uses of their property.)

Recently in the *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 123 S. Ct. 1389 (2003), this Court had the opportunity to but did not apply the "shocks the conscience" standard in evaluating a substantive due process claim in the land use context filed (as in this case) against a municipality and public officials acting in their official capacity. This Court determined that the refusal to issue building permits after approval of a site plan because of the city's submission of the land use determination to referendum procedure did not constitute "egregious or arbitrary government conduct". *Id.* at 1396. In reaching its decision, this Court cited to *Lewis* only for the general proposition that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense'."

Likewise, *Lewis* did not resolve the conflict given Judge Souter express statement that "the issue of municipal

liability is not before us." 523 U.S. at 838 n.2. This Court in *Lewis* granted certiorari "to resolve the conflict among the Circuits *over the standard of culpability on the part of a law enforcement officer* for violating substantive due process *in a pursuit case*." 523 U.S. at 839 (emphasis added).

This Court should grant the petition to resolve the existing conflict on this fundamental constitutional issue. The "shocks the conscience" standard is not an appropriate standard to apply in substantive due process cases that do not involve emergency circumstances and that allow a state actor the opportunity to deliberate and give due consideration to his conduct. *See United Artists*, 324 F.3d at 134 (Nygaard, J. (*Opinion Sur Denial of Rehearing*)). As stated by Judge Nygaard:

> "Shocks the conscience" is useful in due process cases where the actor cannot deliberate. In those situations, exigencies may excuse deliberate indifference. Land use decisions are not made in the heat of the moment without ability to deliberate. Instead, they are (or should be) deliberate decisions made after proper consideration. The appropriate standard, as repeatedly articulated before and after Lewis is "improper motive". *Id.* at 135

> (*citing United Artists*, 316 F.3d at 405-06 (Cowen, J. *dissenting*)).

II. THE PETITION SHOULD BE GRANTED BECAUSE THE THIRD CIRCUIT'S DECISION THAT DENIAL OF A MOTION TO AMEND IS WARRANTED ON THE BASIS OF UNDUE DELAY WITHOUT A SHOWING OF PREJUDICE TO THE RESPONDING PARTY OR THE COURT OR BAD FAITH ON THE PART OF THE MOVING PARTY CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

Amendment of pleadings in civil actions is governed by Rule 15(a) of the Federal Rules of Civil Procedure which provides that once an issue is joined in a lawsuit, a party may amend his pleading "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice require."

Forty years ago, in *Foman v. Davis*, 371 U.S. 178 (1962), this Court had occasion to construe the foregoing portion of Rule 15 (a):

> Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim

> on the merits. In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave should, as the rules require, be 'freely given'.

Id. at 182 (*citations omitted*). Ten years later in *Zenith Radio Corp. v. Hazeltine Research, Inc.* 401 U.S. 321, 330-331 (1971), this Court stated that in deciding whether to permit an amendment, the district court is "required to take into account any prejudice" to the non-moving party.[7]

The Third Circuit Decision in this case conflicts with relevant decisions of this Court in that it holds that a District Court is not required to consider prejudice to the non-moving party or burden on the court in deciding whether to permit an amendment to a pleading. This Court has not re-visited this

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7 Sixteen years earlier, in *Coventry v. United States Steel* Corp., 856 F.2d 514, 520 (3d Cir. 1988), a panel of the Third Circuit stated that "the obligation of the trial court in its disposition of the motion [for leave to amend] is to articulate the imposition or prejudice caused by the delay, and to balance those concerns against movant's reason for delay." Neither the Third Circuit nor the District Court in this case articulated any prejudice caused by the delay nor make any finding that the Lindquists harbored any bad faith or improper motive in bringing the motion. The District Court denied the motion to amend and the Third Circuit affirmed solely on ground of delay.

issue in a long time. Review is necessary to clarify this important area of the law to promote uniformity among all District Courts in the interpretation of Rule 15(a).

CONCLUSION

The petition should be granted to resolve a conflict among the circuits on a constitutional issue of national importance and to provide clear guidance to federal courts as to the appropriate standard of review and liability to be applied to cases alleging substantive due process violations by municipalities arising from their land use decisions. Additionally, the petition should be granted to resolve the Third Circuit's deviation from the long standing precedent of this Court regarding interpretation of a federal rule of civil procedure, which deviation may influence other courts in other circuits.

Respectfully submitted,

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